

MAY 22 1990

JOSEPH F. SPANIOL, J.
CLERK

No. 89-1380

In The
Supreme Court of the United States
October Term, 1989

RANDY WILLIAM CRIDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

BENJAMIN H. B. SLEY
Suite 600 - South Tower
MBank Center
500 N. Water Street
Corpus Christi, Texas 78471
(512) 888-8866

P. MICHAEL JUNG
Counsel of Record
SIDNEY POWELL
STRASBURGER & PRICE
4300 NCNB Plaza
901 Main Street, LB 175
Dallas, Texas 75202
(214) 651-4724

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Argument	1
I. THE GOVERNMENT CANNOT JUSTIFY THE DECISION BELOW ON THE BASIS OF STATE LAW.....	2
II. THIS CASE INVOLVES A PROPERLY PRE- SERVED, IMPORTANT, AND UNRESOLVED IS- SUE OF FEDERAL LAW	4

TABLE OF AUTHORITIES

Page

CASES

<i>Berkovitz v. United States</i> , 486 U.S. 531 (1988).....	6
<i>Continental Oil Co. v. Simpson</i> , 604 S.W.2d 530 (Tex. Civ. App. – Amarillo 1980, writ ref'd n.r.e.).....	5
<i>Dent v. City of Dallas</i> , 729 S.W.2d 114 (Tex. App. – Dallas 1986, writ ref'd n.r.e.), cert. denied, 485 U.S. 977 (1988)	3
<i>Doggett v. United States</i> , 875 F.2d 684 (9th Cir. 1989)	5
<i>Leppke v. Segura</i> , 632 P.2d 1057 (Colo. Ct. App. 1981).....	3
<i>Otis Engineering Corp. v. Clark</i> , 668 S.W.2d 307 (Tex. 1983)	2
<i>Schindler v. United States</i> , 661 F.2d 552 (6th Cir. 1981).....	6
<i>Sheridan v. United States</i> , 487 U.S. 392 (1988)	6
<i>Travis v. City of Mesquite</i> , 764 S.W.2d 576 (Tex. App. – Dallas 1989, writ granted).....	3

SECONDARY SOURCES

Restatement (Second) of Torts § 319 (1965).....	4
---	---

No. 89-1380

In The
Supreme Court of the United States
October Term, 1989

RANDY WILLIAM CRIDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

The petitioner Randy William Crider respectfully submits this reply memorandum in support of his petition for a writ of certiorari in this matter.

ARGUMENT

This case is not, as the government mischaracterizes it, *see* Brief. for the United States in Opposition ("U.S. Brief") at 7-8, a "negligent failure to enforce the law" case. Nor is it, as the Court of Appeals mischaracterized it, *see* Petition at A-13-14, a "negligent failure to take into custody" case; indeed, the government admitted from the outset that the park rangers "exercised control over John Landry such that Landry was not free to leave the scene

at the time he was stopped.”¹ This is instead a “negligent release from custody” case, just as it would have been if the rangers had taken control of a grenade-wielding terrorist in an airport departure lounge and then released him, fully armed.

I. THE GOVERNMENT CANNOT JUSTIFY THE DECISION BELOW ON THE BASIS OF STATE LAW.

The government profoundly errs in stating that petitioner Crider “does not seriously challenge the court of appeals’ holding that Texas law did not impose an actionable duty on the Park Rangers” U.S. Brief at 6. Crider indeed challenges that indefensible holding with the utmost sincerity and vigor. Both parties have acknowledged, however, that the issue of state law duty (apart from the effect of the federal regulations) is not before this Court.² Notwithstanding this acknowledgment, the government, perhaps in an effort to minimize the importance of this case or to “poison the well,” devotes substantial energy and space to an argument that the Court of Appeals’ state law holding was correct. U.S. Brief at 4-8. This immaterial contention warrants at least a minimal response.

The Supreme Court of Texas in *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 311 & n.2 (Tex. 1983), quoted and relied heavily on Restatement (Second) of Torts § 319 (1965), which fits this case like a glove:

¹ Standard Joint Pretrial Order at 8, ¶ 10; see also Trial Transcript at 298-99 (testimony of Ranger Couser).

² Compare Petition at 18 with U.S. Brief at 6, 9.

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Otis cannot be limited to its facts, as the government seeks to do, U.S. Brief at 6-7; Section 319 knows no "employer-employee" limitation. Moreover, the *Otis* court not only referred to "the duty to the employer or one who can exercise charge over a dangerous person," 668 S.W.2d at 311 (emphasis supplied), but also relied in reaching its decision on an out-of-state case³ not involving the employer-employee relationship, *id.* at 310.

Nor is the state law rule different in the law enforcement context. In *Dent v. City of Dallas*, 729 S.W.2d 114 (Tex. App. – Dallas 1986, writ ref'd n.r.e.), *cert. denied*, 485 U.S. 977 (1988), on which the government places heavy reliance, the lawbreaker who caused injury to the plaintiff was neither under the officer's control⁴ nor observably dangerous to others;⁵ thus § 319 liability was not implicated. Moreover, the government fails to acknowledge that a sequel to *Dent*, *Travis v. City of Mesquite*, 764 S.W.2d 576 (Tex. App. – Dallas 1989, writ granted), has

³ *Leppke v. Segura*, 632 P.2d 1057 (Colo. Ct. App. 1981).

⁴ The officer had ordered the suspect to pull onto the shoulder of the road; the suspect began to do so but then fled at high speed. 729 S.W.2d at 115.

⁵ The suspect was stopped not because of any physical condition or behavior, but because he fit the description of someone who had passed a forged prescription a short time before. 729 S.W.2d at 115.

been accepted for review by the Supreme Court of Texas and is ripe for decision and probable reversal.

In short, there is no basis for the Court of Appeals' determination that Texas courts would not impose liability, based on § 319 and related principles, under the facts of this case.

II. THIS CASE INVOLVES A PROPERLY PRESERVED, IMPORTANT, AND UNRESOLVED ISSUE OF FEDERAL LAW.

At the outset, the government's claim that Crider did not raise below the contention that the Law Enforcement Procedures of Padre Island National Seashore imposed an actionable duty on the rangers, *see* U.S. Brief at 6, 8, cannot go unchallenged. At all stages of the case, Crider has urged that the regulations created a mandatory duty for the rangers to retain custody of Landry. Because the district court held that liability existed on the basis of general Texas tort law, the status of the mandatory duty under the regulations as an independent source of liability did not emerge as an issue until the Court of Appeals' decision. Thereafter, Crider raised in the Court of Appeals the precise contention made here: that the regulations created an actionable duty independent of the state common law of torts.⁶

The government attempts to avoid the effect of the regulations by arguing first that they are not regulations

⁶ Suggestion for Rehearing En Banc [and for panel rehearing pursuant to Fifth Circuit Internal Operating Procedures] at 6-7.

at all, U.S. Brief at 9, and second that they apply only after the decision to charge a suspect with a particular offense has been made, U.S. Brief at 9-10. Neither contention is supported by the record. The fact that the regulations did not appear in the Code of Federal Regulations does not prevent them from creating an actionable duty; this was true of the naval regulations which gave rise to such a duty in *Doggett v. United States*, 875 F.2d 684 (9th Cir. 1989), and, apparently, of those at issue in *Sheridan v. United States*, 487 U.S. 392 (1988), as well. Nor does calling the regulations "internal guidelines," cf. U.S. Brief at 9, gainsay the mandatory duty which they imposed for the protection of the public. Finally, the language of the procedures prescribed for situations involving "DWI's" (driving while intoxicated) and "DUID" (driving under the influence of drugs), as well as those for other situations, clearly indicates that the regulations prescribe (as their title states) "law enforcement procedures" and not merely "post-charge procedures."⁷

Apart from an unavailing attempt to distinguish *Doggett*, see U.S. Brief at 10-11,⁸ the government does not

⁷ For example, the "DWI's" procedure specifies that a suspect who passes a breathalyzer test is to be issued a violation notice for careless driving, Plaintiff's Exhibit 15, thus indicating that it governs all situations in which a suspect has *actually* driven while intoxicated, not merely those in which a decision has been made to charge a suspect with that offense.

⁸ Although Texas has no *statutory* law of negligence *per se* based on the violation of mandatory regulations as did California in *Doggett*, the Texas common law acknowledges such liability. E.g., *Continental Oil Co. v. Simpson*, 604 S.W.2d 530, 534 (Tex. Civ. App. - Amarillo 1980, writ ref'd n.r.e.).

seriously challenge the concept that a federal regulation may form the basis for liability under the state law of negligence *per se* in a Federal Tort Claims Act case. It does argue, however, that "an actionable duty to enforce the law in order to prevent injuries to third parties" must stem from a federal statute or expression of regulatory intent to create such liability. U.S. Brief at 11 n.8. This unsupported argument is easily answered: Congress has made an *a priori* decision that the United States' tort liability is to be measured by state law, not by federal enactments specific to each situation in which such liability potentially arises. Texas, in turn, has determined that tort liability will arise from the violation of mandatory administrative regulations whose purpose is to protect against the kind of injury which has occurred. Finally, the federal authorities at Padre Island National Seashore have wisely required that federal law enforcement personnel retain custody of drivers who are under the influence of alcohol or drugs, for the obvious purpose of protecting the public from injury at the hands of such drivers.

This Court has resolved the effect of mandatory federal regulations on the "discretionary function" exception to the FTCA,⁹ and on the "assault and battery" exception.¹⁰ It is now time to address a more fundamental question, as to which the lower courts have been "not entirely harmonious," *Schindler v. United States*, 661 F.2d 552, 560 (6th Cir. 1981), namely the "interplay" of such

⁹ *Berkovitz v. United States*, 486 U.S. 531 (1988).

¹⁰ *Sheridan v. United States*, 487 U.S. 392 (1988).

regulations with the state law of negligence. That question is squarely presented to the Court in the present case, and warrants review.

BENJAMIN H. B. SLEY
Suite 600 - South Tower
MBank Center
500 N. Water Street
Corpus Christi, Texas 78471
(512) 888-8866

Respectfully submitted,
P. MICHAEL JUNG
Counsel of Record
SIDNEY POWELL
STRASBURGER & PRICE
4300 NCNB Plaza
901 Main Street, LB 175
Dallas, Texas 75202
(214) 651-4724